Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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No. 422

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

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1. Whether, when eight courts of appeals agree that orders denying motions to disqualify counsel are immediately appealable, this Court should grant certiorari to review the issue of appealability of such orders where petitioner deliberately elected not to raise that question in the Court of Appeals.

2. Whether the Court of Appeals correctly held that Kirkland & Ellis must be disqualified from representing petitioner in a lawsuit against respondents alleging conflicting positions with respect to the same subject matter on which Kirkland was also representing respondents' interests before Congress.

STATUTES INVOLVED.

Title 28, United States Code, provides in pertinent part:

§ 1292. Interlocutory decisions

. . . .

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE.

This case arises out of the simultaneous representation of conflicting interests by one law firm—Kirkland & Ellis—culminating on October 15, 1976 in two documents, one commending respondents' competitive performance in the uranium industry and the other (the complaint herein) charging that respondents have engaged in anticompetitive practices in that industry.

Respondents Kerr-McGee, Gulf and Getty are three oil companies engaged in producing and marketing uranium. Proposals to require horizontal divestiture by oil companies of interests in alternative energy resources, including uranium, were presented to Congress in October 1975. These proposals received significant support in Congress and caused great concern to the oil industry. In November 1975 the American Petroleum Institute ("API"), a trade association of which respondents are substantial members, and of which Kerr-McGee and Getty are directors, began a major lobbying effort to defeat the horizontal divestiture legislation.

In February 1976, the law firm of Kirkland & Ellis ("Kirkland") was retained by the API to perform "lobbying-type functions" on behalf of API and certain of its members in connection with opposing the proposed legislation. On May 4, 1976, Kirkland partner Fred Rowe was given instructions that his work "should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation" and studying "the probable effects on oil companies that would have to divest assets." Kirkland was also to carry out "interviews . . . with a cross-section of industry personnel" and to "act as an independent expert counsel and hold any company information learned

through these interviews in strict confidence, not to be disclosed to any other company, or even to API."(R. App. A4).[1]

Pursuant to a request from Kirkland, a meeting was held at Gulf's office in Denver on May 28, 1976, at which time Kirkland partner Nolan Clark interviewed several executives of Gulf and its subsidiaries on matters pertaining to Gulf's operations in alternative energy fields, including uranium. Among the questions raised in connection with this meeting were the following: what are the barriers to entry in the uranium industry; what is the competitive nature of the industry and is competition increasing or decreasing; what is the nature of oil company uranium reserves; are oil companies aiding uranium production; and have oil companies increased reserves faster than production. During the interview Gulf disclosed confidential matters to Kirkland in the belief that the Kirkland firm was acting as counsel for both API and Gulf with respect to horizontal divestiture of Gulf's uranium business.

Kirkland also requested interviews of Kerr-McGee executives. On June 9, 1976, in Oklahoma City, Nolan Clark interviewed George Cobb, Kerr-McGee Executive Vice-President, and R. J. Hefler, a Vice-President, on matters pertaining to horizontal divestiture, including uranium. After being assured that all information disclosed would be held in confidence, Cobb discussed the current state of the uranium market, including how prices escalated and supplies had tightened, and some of the reasons therefor. Since Kerr-McGee believed Kirkland was representing both API and Kerr-McGee with respect to horizontal divestiture, no attorney other than Clark was present at the meeting.

In addition to these interviews, Getty, Gulf and Kerr-McGee all received questionnaires initiated and developed by Kirkland calling for confidential uranium information, including data on

1. The detailed information concerning uranium operations requested at the interviews and by the written questionnaires is summarized in the opinion of the Court of Appeals (See Respondents' Appendix, pp. A6-A10 (herein cited "R. App.")).

reserves and efforts to develop reserves, for use by Kirkland in representing respondents before Congress. All three respondents submitted this confidential information directly to Kirkland during the summer of 1976 upon the understanding that it would be held in strict confidence.[2]

On October 15, 1976 Kirkland published a 230-page report entitled "Horizontal Oil Company Divestiture and Separation Proposals" opposing the proposed legislation. References to uranium appear throughout the report, which marshalls facts and arguments to show that oil company ownership of coal and uranium has promoted competition in those industries. In particular, the report asserts that current increases in uranium prices are a result of increasing demand and short sales of uranium by Westinghouse, that oil company entry into uranium production has stimulated competition, and that oil companies had no incentive to, and have not, restricted uranium production. The report concludes that "energy industries, both individually and collectively, are competitive today and are likely to remain so." (R. App. A5).

The same day this report was issued praising the oil companies' competitive performance with specific reference to respondents pro-competitive posture in uranium (R. App. A2), Kirkland sued 29 defendants, including Kerr-McGee, Gulf and Getty, alleging they had illegally conspired to restrain trade and competition in the uranium industry.[3] As the District Court concluded, "[a] comparison of the two documents reveals

2. Getty's information was provided in June, and the Gulf and Kerr-McGee questionnaires were returned in August.

3. Kirkland also represents Westinghouse in contract actions resulting from Westinghouse's refusal in 1975 to honor contracts for sale of approximately 65 million pounds of uranium. At that time Westinghouse blamed the rapid increase in uranium prices on the 1973 Arab oil embargo and on governmental action in uranium. Most of the contract actions were consolidated for trial in the Eastern District of Virginia at Richmond. Although respondents, following a written request from Judge Merhige actively soliciting their cooperation, provided information to Westinghouse in the Richmond case, none were informed that Westinghouse intended to sue them.

a rather basic conflict in their contentions and underlying theories." 448 F. Supp. at 1295. That court further observed: "[p]erhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse complaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry." 448 F. Supp. at 1296.

Kirkland's complaint in this case contradicts the pro-competitive conclusions of Kirkland's expensive and extensive report, and not only destroyed the report's effectiveness but also that of Fred Rowe as a congressional witness opposing horizontal divestiture legislation. Nevertheless, at no time prior to the filing of this action did Kirkland advise Kerr-McGee, Gulf or Getty of any plan to initiate litigation against them, despite the fact that Kirkland's Chicago lawyers who were preparing the complaint against respondents were well aware that their partners were working on behalf of API and respondents. In fact, William Jentes, one of Kirkland's lead attorneys in the antitrust case, prepared a legal memorandum in August 1976 for use by API in opposing horizontal divestiture of oil company assets. (R. App. A19). The Kirkland memorandum was mailed to respondents, and others, on September 23, 1976.[4]

In January 1977, before answers had been filed by respondents to Kirkland's complaint, Kerr-McGee, Gulf and Getty moved to disqualify Kirkland from representing Westinghouse in this action because of its contemporaneous and conflicting representation of Westinghouse and respondents. Pending determination of the disqualification motions the District Court stayed all discovery by Kirkland against the moving defendants.[5]

4. Although Kirkland now appears to argue it constructed a "Chinese Wall" between its offices, its own admissions destroy this theory. The Jentes memo and the knowledge of Kirkland's Chicago lawyers demonstrate the fallacy of the "Chinese Wall" argument.

5. In February 1978, the Chicago law firm of Freeman, Rothe, Freeman & Salzman (the "Freeman firm") was engaged to represent Westinghouse pending resolution of the disqualification motions, and

(Footnote continued on next page.)

On April 18, 1978, the District Court issued an opinion finding a basic conflict between the API report prepared by Kirkland and the Complaint in this action and finding further that the respondents had "justifiable fears that their disclosures will return to haunt them." (R. App. A18.) The District Court further found that Kirkland had violated Canon 9 of the Code of Professional Responsibility, but declined to disqualify them. That court ruled that there had been no violation of the fiduciary obligations imposed by Canons 4 and 5 of the ABA Code of Professional Responsibility because no attorney-client relationship existed between Kirkland and the respondents.

On July 25, 1978, the Court of Appeals for the Seventh Circuit reversed, holding that the District Court had improperly limited its consideration to technical principles of agency law to determine whether the fiduciary obligations imposed by Canons 4 and 5 of the Code of Professional Responsibility were applicable to Kirkland's representation of respondents, and had improperly created a special category or exemption from the provisions of the canons for "large, multi-city" firms like Kirkland, which exemption was not applicable to other members of the bar. The court found that all relevant facts established an attorney-client relationship, and that Kirkland's conflict of interest violated Canons 4 and 5, as well as Canon 9. The Court of Appeals gave Westinghouse the option of replacing Kirkland as counsel, or dismissing the action against respondents.

(Footnote continued from preceding page.)

the District Court modified its stay order to permit the Freeman firm to conduct discovery on behalf of Westinghouse. On September 13, 1978 the New York law firm of Donovan, Leisure, Newton & Irvine entered its appearance as additional counsel for Westinghouse and both firms are now actively prosecuting the case.

REASONS FOR DENYING THE WRIT.

The Kirkland firm was disqualified from representing petitioner Westinghouse, plaintiff in this antitrust litigation against respondents Kerr-McGee, Gulf and Getty, 3 of 29 named defendants, because Kirkland, while preparing to file this case against those 3 defendants, accepted and carried out a legal engagement on behalf of those companies to oppose congressional proposals concerning the same subject matter involved in the lawsuit. In the course of that engagement, Kirkland solicited and used confidential information from each of these three companies, each of which was led to believe Kirkland was acting in its interest. This indisputable and simultaneous conflicting representation resulted in some Kirkland lawyers issuing a "white paper" praising the competitive performance of Kerr-McGee, Gulf and Getty in the uranium industry on the same date that other Kirkland lawyers filed the present complaint condemning the same three companies for alleged violations of the antitrust laws in the same industry.

The espousal of what the District Court described as "diametrically opposing theories" by the same law firm on the same subject matter was conduct which both courts below found to be in violation of Canon 9 of the ABA Code of Professional Responsibility and which the Court of Appeals also found to be in violation of Canons 4 and 5 of the Code.

The sole issue for review is whether, in these particular factual circumstances, this particular law firm should have been disqualified (or these respondents dismissed as defendants). This hardly qualifies as a "special and important" issue under Supreme Court Rule 19. The case is active in the District Court with Westinghouse being represented by two able law firms, one having entered the case while the disqualification motions were

pending in the District Court and the other having entered after the Court of Appeals disqualified Kirkland. These two well-known antitrust firms are prosecuting the case with vigor. Whatever importance the antitrust issues in the case may have as a matter of public interest is irrelevant to the disqualification of Kirkland, despite petitioner's protestations to the contrary.

The disqualification motions were decided, by agreement of all parties, on the basis of affidavits, exhibits and argument of counsel. No hearing or oral testimony was involved. The facts here are undisputed. Only the legal question as to the necessary consequences of those facts was decided by the Court of Appeals.

Based on this completely documentary record, the Court of Appeals affirmed the District Court's findings of the violation of Canon 9 and corrected that court's conclusion that an attorney-client relationship sufficient to invoke Canons 4 and 5 can arise only from formalistic compliance with the technical rules of agency. The Court of Appeals confirmed the high standards of conduct expected from lawyers in their dealings with laymen, holding that Canons 4 and 5 will be invoked when a lawyer performs a lawyer's function based on confidential information solicited and obtained from persons whose interests the lawyer was protecting.

The Court of Appeals also confirmed the essential principle that there cannot be one set of ethical standards for a large law firm in complex litigation and another for the rest of the bar. Disqualification of the offending firm, or dismissal of the offended parties, was the only appropriate remedy for this ethical violation. This is not a novel or unique ruling requiring the action of this Court. Given the narrow factual posture of this case, review by this Court would produce judicial guidelines of only limited applicability.

Here both courts below found the disqualification motions to be in good faith raising serious ethical problems. The question of appealability was not raised by the petitioner at any point in the proceedings below and, in fact, Kirkland's lead attorney

in the District Court informed that court that denial of such order was appealable. By thus conceding the issue of appealability, Kirkland effectively deprived this Court of any briefing or consideration of the question by the Court of Appeals and effectively prevented respondents from proceeding by way of certification under 28 U. S. C. § 1292(b), or by writ of mandamus under 28 U. S. C. § 1651. As held by eight courts of appeal, ethical violations of the nature described above must be promptly reviewable to maintain public confidence in the bench and bar. Discretionary review by this Court is inappropriate and the petition should be denied.

I.

THE APPEALABILITY OF THIS DISQUALIFICATION ORDER DOES NOT REQUIRE REVIEW BY THIS COURT.

A. Kirkland's Conduct Below Should Preclude Petitioner from Raising the Appealability Issue Here.

Kirkland raises for the first time in the petition for certiorari the issue of the appealability under 28 U. S. C. § 1291 of an order denying disqualification. In neither the District Court nor the Court of Appeals did the petitioner contend that such an order was not immediately appealable. Not once in its 56 page brief on the disqualification issue or its 18 page Petition for Rehearing did Kirkland claim that the Seventh Circuit lacked jurisdiction to review the denial of disqualification. Nor did Kirkland raise the issue with the trial judge when he denied respondents' motion to stay Kirkland's participation pending appeal. In fact, Fred Bartlit, Kirkland's lead attorney, asserted in a hearing before the District Court that orders denying attorney disqualification are appealable, thus effectively preventing respondents from pursuing the avenue of certification by the District Court to permit immediate appeal under 28 U. S. C.

§ 1292(b) or from proceeding by way of mandamus under 28 U. S. C. § 1651.[6]

Although this Court may review jurisdictional questions at any time, the issue of immediate appealability is not ripe in this case. Kirkland's action precluded any briefing or consideration of the question in the Court of Appeals, thus depriving this Court of the focus such proceedings below afford and which this Court normally expects.[7] In these circumstances, this Court should exercise its discretion to deny the writ.

B. Immediate Review by the Court of Appeals Was Necessary to Remedy the Serious Ethical Transgressions Present Here.

The Court of Appeals correctly stated that the District Court's order denying disqualification was immediately appealable under the collateral order doctrine enunciated in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), which it had previously held to be applicable to disqualification orders in *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706 (7th Cir. 1976). The Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have also held that orders denying disqualification are appealable under the collateral order doctrine of *Cohen*.[8] The First Circuit

6. The district judge himself raised the question of certification but was assured by Mr. Bartlit that it was not necessary because the order was appealable. (R. App. A25).

7. *United States* v. *Ortiz*, 422 U. S. 891, 898 (1975); *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388, 397 (1971); *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147 (1970); *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967); *California* v. *Taylor*, 353 U. S. 553, 557, n. 2 (1957).

8. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800 (2d Cir. 1974); *Greene* v. *Singer Co.*, 509 F. 2d 750 (3d Cir. 1971), *cert. denied*, 409 U. S. 848 (1972); *MacKethan* v. *Peat, Marwick, Mitchell & Co.*, 557 F. 2d 395 (4th Cir. 1977); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F. 2d 333 (5th Cir. 1961); *Melamed* v. *ITT Continental Baking Co.*, 534 F. 2d 82 (6th Cir. 1976); *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602 (8th Cir. 1977), *cert. denied*, ... U. S. ..... (1978); *Fullmer* v. *Harper*, 517 F. 2d 20 (10th Cir. 1975).

has not addressed the issue. The D. C. Circuit is the only Circuit which has refused to pass judgment on lower court orders denying disqualification prior to final judgment. *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F. 2d 1022 (D. C. Cir. 1976).[9] That court based its decision on the existence of alternative methods of appeal available through certification under § 1292(b) or mandamus under § 1651, from which respondents here have been effectively blocked by Kirkland's action below.

The D. C. Circuit decision in *Community Broadcasting* subordinates the serious questions of lawyers' professional responsibility to speculative fears that making denials of disqualification motions immediately appealable will encourage the filing of frivolous motions interposed for delay. 546 F. 2d at 1027.[10] But the reported decisions, including the present case, show that most disqualification motions are not frivolous or filed merely for delay.[11] They are made in good faith and raise serious issues which affect the public confidence in the bench and bar, as well as the professional relationship between lawyer and client. The appeal in this case was resolved in less than three months. Surely it is no waste of appellate court time to speedily resolve

9. The Ninth Circuit decision, *Cord* v. *Smith*, 338 F. 2d 516 (9th Cir. 1964), *clarified*, 370 F. 2d 418 (9th Cir. 1966), cited by petitioner, cannot be aligned with the *Community Broadcasting* case on the question of review of orders denying disqualification. The Ninth Circuit has departed from the approach it took in *Cord*, and now appears to adhere to the majority view announced by the Second Circuit *en banc* in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800 (2d Cir. 1974). See, *Trone* v. *Smith*, 553 F. 2d 1207 (9th Cir. 1977).

10. The Eighth Circuit responded to the D. C. Circuit's concern about delay as follows: "[W]e consider the risk [of delay] insufficient to warrant an insistence that trials be conducted under a cloud of potential disqualification. Moreover, disciplinary powers of courts are available to deal with unfounded motions to disqualify and frivolous appeals from their denial." *Fred Weber, Inc.* v. *Shell Oil Co.*, 566 F. 2d 602, 607 (8th Cir. 1977), *cert. denied*, ... U. S. ..... (1978).

11. The District Court here specifically so stated with respect to the instant motion in a hearing on a stay on April 24, 1978. (R. App. A27).

these types of questions rather than let them linger in uncertainty until final judgment which may not come until years later. A "business first—ethics later" attitude is not befitting our profession and would not be favorably perceived by the public.[12]

Kirkland argues that orders denying disqualification do not come within the collateral order doctrine of *Cohen*, but as eight courts of appeals have found, such orders meet all the *Cohen* standards in that they (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment.[13]

Especially important in the context of this case is the perception of the public, whose loss of confidence in the bar would be irremediable if ethical transgressions are not immediately reviewable.[14] The canons of ethics are intended to have

12. The *Community Broadcasting* case has been effectively criticized in Comment, Orders Denying Disqualification of Counsel, 30 Vand. L. Rev. 259 (1977).

13. Kirkland's argument that there is no cognizable injury from an ethical transgression unless an adverse verdict is rendered against the aggrieved parties (Pet. p. 15), is an assertion that the canons of ethics are irrelevant unless monetary considerations are involved. The taint that occurs from the renunciation of the obligations of confidentiality and loyalty imposed by Canons 4 and 5 when an attorney sues his current client cannot be adequately removed after trial, nor can the client's "justifiable fears that their disclosures will return to haunt them in the present litigation" (R. App. A18) be effectively reviewed after trial. See *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800, 805 (2d Cir. 1976). It has been noted that appellate courts are hesitant to reverse collateral trial court orders after final judgment, so that it is unlikely that there will be an objective determination of the ethical considerations in a post-trial appeal. In contrast, where immediate appeal has been allowed on denials of disqualification, the reversal rate is approximately fifty percent. Comment, Orders Denying Disqualification of Counsel, 30 Vand. L. R. 259, 271-272 (1977). Refusing to allow immediate appeals could thus have the effect of diluting the standards of the canons of ethics.

14. *See, Cinema 5 Ltd.* v. *Cinerama, Inc.*, 528 F. 2d 1384, 1387 n. 1 (2d Cir. 1976), where the Court explained that while prophylactic orders and Chinese walls may alleviate the judge's or lawyer's qualms, this same confidence could not be imparted to the public "by court order".

a prophylactic effect, *Emle Industries, Inc.* v. *Pantetex*, 478 F. 2d 562, 571 (2d Cir. 1973), which would be destroyed if good faith allegations of conflicts of interest cannot be reviewed by the Court of Appeals prior to final judgment.[15] This would result in the diminution of public confidence in lawyers generally, as well as in the willingness of clients to candidly disclose information to their lawyers. As the Second Circuit stated in *Silver Chrysler, supra*, 496 F. 2d at 805, "it is fatuous to suppose that review of the final judgment will provide adequate relief" from orders denying disqualification.

A practical approach to the matter demands immediate resolution by the appellate court. In the present case it is probable that a final judgment will not be entered until 1981 or later. It is difficult to justify a rule which would cause the parties at that late date to start all over again when, as the Court of Appeals unanimously held, the District Court's denial of disqualification was erroneous. The consequence here would be the waste of years of preparation and millions of dollars. There is no logical reason to believe that the Court of Appeals' unanimous opinion would be any different after years of pretrial and trial proceedings. Contrary to the views of petitioner, deferring review would create a real potential for delay by increasing the risk of a second trial. Only immediate review can avoid needless expenditure of judicial, attorney, and client time. *Silver Chrysler, supra*, 496 F. 2d at 806.

No lawyer should be permitted to sue his present client. Only when such ethical transgressions are immediately remediable by prompt appeal can the public be expected to repose the confidence in lawyers which is so necessary to the successful and responsible accomplishment of the lawyer's tasks and the proper functioning of the judicial system.

15. In those instances where a challenge to counsel is clearly frivolous, procedural avenues are available to allow summary dismissal of the appeal. See Rule 15 of the Rules of the U. S. Court of Appeals for the Seventh Circuit. See also, F. R. App. P. 38 which allows a court of appeals to award damages and costs for a frivolous appeal.

II.

THE COURT OF APPEALS' DECISION WAS CORRECT AND PRESENTS NO ISSUE JUSTIFYING REVIEW BY THIS COURT.

A. The Court of Appeals Correctly Held That the Undisputed Facts Established an Attorney-Client Relationship Sufficient to Invoke the Obligations of the Code of Professional Responsibility.

Petitioner is able to assert that the Court of Appeals' conflict of interest standard is "unprecedented" only by substantially mischaracterizing the court's holding. Kirkland argues that the court held that a fiduciary obligation may be imposed upon an attorney by a party's litigation affidavit claiming that the party unilaterally believed the attorney was acting on his behalf. (Pet. at pp. 19, 22, 9.) However, the Court of Appeals made it quite clear that Kirkland's attorney obligations were based upon the totality of Kirkland's conduct, not simply "belief" alone. The Court explicitly noted the undisputed facts that Kirkland concluded that it needed access to confidential oil company information not publicly available, that Kirkland itself solicited such information from the oil company in its interviews and its questionnaires carefully promising that such disclosures would be held by Kirkland in strict confidence,[16] and that these steps constituted professional legal services necessary to carry out Kirkland's duties as counsel in resisting horizontal divestiture.

On those facts, and not just because of the respondents' belief regarding Kirkland's role, the court quite properly rejected the District Court's holding that, regardless of what Kirkland had done, unless it could be shown to have given subjective consent to act as the oil companies' attorneys, it was free of any

16. The court noted that such information was submitted ". . . to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply." (R. App. A20).

obligation to them.[17] Instead, the Court of Appeals found Kirkland's conduct constituted the implied undertaking necessary to establish a professional relationship giving rise to Kirkland's obligation under Canons 4 and 5, as well as Canon 9.

The Court of Appeals also properly rejected Kirkland's attempt to shift the burden of discerning Kirkland's conflict to the client, holding that it was "Kirkland's duty to keep the oil companies advised of actual or potential conflicts of interest, not the oil companies' burden to divine those conflicts." (R. App. A20). The court noted that the record disclosed that some of Kirkland's own partners were kept unadvised of the antitrust complaint until after it was filed, and the oil companies could not be presumed to have greater knowledge of Kirkland's plan than did those Kirkland lawyers.

Petitioner cites no decision by this Court and no authority elsewhere which supports its insistence upon subjective consent as opposed to actions which imply an undertaking to be bound by the ethical obligations of a fiduciary relationship. Indeed, its authorities are to the contrary, or are factually inapposite.[18]

Kirkland's final assertion (Petition 20-21) is that the Court of Appeals erred in failing to create special rules exempting it, and

17. The District Court indicated an attorney-client relationship could be implied from performance of a purely legal service (like appearing in court or drafting a contract) but not from the service here—lobbying against proposed legislation. The Court of Appeals rejected such a narrow view of a lawyer's responsibility. (R. App. A14, A18).

18. The section of Corpus Juris Secundum relied on by petitioner (Pet., p. 18, fn. 19) instead supports respondents, since it acknowledges that an attorney-client relationship may be founded upon an implied undertaking, as found by the Court of Appeals (C. J. S. Attorney and Client, § 65, p. 848). *Committee on Professional Ethics & Grievances* v. *Johnson*, 447 F. 2d 169, 174 (3d Cir. 1971) was decided on procedural grounds and did not reach the ethical questions presented. Similarly inapposite is *In re Yarn Processing Patent Validity Litigation*, 530 F. 2d 83, 90 (5th Cir.), *rehearing denied*, 536 F. 2d 1025 (5th Cir. 1976), where the challenged counsel, unlike Kirkland, neither solicited nor received confidential information.

other large multi-city firms, from well-settled ethical precepts (including imputation of knowledge confided to some partners in a firm to other partners of that firm)[19] which apply to the remainder of the bar. Implementation of such a rule would seriously undermine public confidence in the bench and bar, and inhibit the ability of clients to freely disclose confidences to their counsel. The Court of Appeals' decision to apply the canons in an even-handed manner to all members of the bar is correct, and there exists no need for this Court to review that decision.[20]

B. The Court of Appeals Did Not Ignore the District Court's Findings of Fact.

Petitioner complains that the Court of Appeals improperly overturned or ignored the District Court's findings of fact.[21] However, there is no instance in which the Court of Appeals found any fact contrary to the District Court. On the contrary, the only dispute between the Court of Appeals and the District Court is the legal standard by which to review the undisputed facts. Thus, the Court of Appeals correctly held that the District Court applied the wrong legal standard by determining Kirkland's ethical obligations solely on the basis of a technical analysis of agency principles, while overlooking the substance of the relationship disclosed by the undisputed factual record.

19. See *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976); *Laskey Bros.* v. *Warner Bros. Pictures, Inc.*, 224 F. 2d 824, 826-827 (2d Cir. 1955), *cert. denied*, 350 U. S. 932, 76 S. Ct. 300, 100 L. Ed. 814 (1956).

20. Kirkland's professed concern over enforcement of the antitrust laws if large firms are inhibited in attempts "to maintain diversity in their practice" is misplaced. Kirkland was replaced in this action by a large well-known firm—Donovan, Leisure, Newton & Irvine. The rule applied by the Court of Appeals will only inhibit those who would accept conflicting representations in their attempts to increase the "diversity" of their practice.

21. The disqualification matter was heard by agreement on the affidavits submitted by petitioner and respondents. The Court of Appeals was equally well equipped to ascertain the proper conclusions to be drawn from the undisputed facts contained in the documentary record.

C. The Court of Appeals Properly Determined That the Conflict of Interest Required Disqualification of Kirkland or Dismissal of Respondents.

The Court of Appeals, after finding a violation by Kirkland of Canons 4, 5 and 9 of the Code of Professional Responsibility concluded that the nature of the violation—suing its own clients on a subject while representing them in the same crucial subject matter and while possessing confidential disclosures from such clients—required disqualification of Kirkland or dismissal of the respondents. This conclusion was based upon a proper application of relevant law to the particular facts in this action.[22] It presents no basis for review by this Court.

22. *See, e.g., IBM* v. *Levin*, 579 F. 2d 271, 282-283 (3rd Cir. 1978); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562, 570-571 (2d Cir. 1973). Petitioner would apparently have the Court believe that there is no law firm other than Kirkland & Ellis which is capable of effectively representing Westinghouse in this matter. Petitioner is now represented in the District Court by two experienced antitrust firms who are aggressively prosecuting the case. This fact alone renders insignificant the "public interest" arguments advanced by petitioner and negates entirely the notion that the disqualification of Kirkland poses a vital threat to Westinghouse's very existence.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 78-1544, 78-1545, 78-1546 and 78-1547

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff-Appellee,

vs.

KERR-McGEE CORPORATION, NORANDA MINES LIMITED, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, and GETTY OIL COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-3830—Prentice H. Marshall, *Judge.*

ARGUED JUNE 12, 1978—DECIDED JULY 25, 1978

Before FAIRCHILD, *Chief Judge,* SPRECHER and BAUER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The novel issues on this appeal are (1) whether an attorney-client relationship arises only when both parties consent to its formation or can it also occur when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former's attorney and (2) whether the size and geographical scope of a law firm exempt it from the ordinary ethical considerations applicable to lawyers generally.

The four separate appellants are some of the defendants in this antitrust case who were each denied their motions to disqualify the law firm of Kirkland and Ellis ("Kirkland") from further representing the plaintiff, Westinghouse Electric Corporation ("Westinghouse"). Whether fortuitously or by design, on the same day, October 15, 1976, Kirkland, while representing the American Petroleum Institute ("API"), of which three of the appellants, Gulf Oil Corporation ("Gulf"),[1] Kerr-McGee Corporation ("Kerr-McGee") and Getty Oil Company ("Getty"), were members, released a report which took an affirmative position on the subject of competition in the uranium industry, while simultaneously filing this lawsuit, representing Westinghouse, seeking to establish an illegal conspiracy in restraint of trade in the uranium industry.

The fourth appellant, Noranda Mines Limited ("Noranda"), asserts a different conflict of interest in Kirkland resulting from its prior representation of Noranda from 1965 to 1967 in several matters.

The complaint in this case was filed on October 15, 1976 and the four appellants moved to disqualify Kirkland in January and February 1977. On April 18, 1978, the district court filed a lengthy memorandum followed by orders denying the disqualification motions. *Westinghouse Electric Corp.* v. *Rio Algum Limited*, 448 F. Supp. 1284 (N. D. Ill. 1978). These appeals followed. This court has jurisdiction under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949). *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 709 (7th Cir. 1976).

I

On September 8, 1975, Westinghouse, a major manufacturer of nuclear reactors, notified utility companies that 17 of its long-term uranium supply contracts had become "commercially impracticable" under § 2-615 of the Uniform Commercial Code. In response, the affected utilities filed 13 federal actions, one state action, and three foreign actions against Westinghouse, alleging breach of contract and challenging Westinghouse's invocation of § 2-615. The federal actions were consolidated for trial in the Eastern District of Virginia at Richmond under MDL Docket No. 235.

1. Gulf Minerals Canada Limited is also a defendant but for convenience hereafter is included with Gulf Oil Corporation as "Gulf."

As an outgrowth of its defense of these contract actions, Westinghouse on October 15, 1976, filed the present antitrust action against 12 foreign and 17 domestic corporations engaged in various aspects of the uranium industry.

Kirkland's representation of Westinghouse's uranium litigation has required the efforts of 8 to 14 of its attorneys and has generated some $2.5 million in legal fees.

Contemporaneously with its Westinghouse representation in the uranium cases, Kirkland represented API, using six of its lawyers in that project.

In October, 1975, Congress was presented with legislative proposals to break up the oil companies, both vertically by separating their control over production, transportation, refining and marketing entities, and horizontally by prohibiting cross-ownership of alternative energy resources in addition to oil and gas. Since this proposed legislation threatened oil companies with a potential divestiture of millions of dollars of assets, in November, 1975, the API launched a Committee on Industrial Organization to lobby against the proposals. On December 10, 1975, API's president requested that each company designate one of its senior executives to facilitate coordination of the Committee's activities with the individual companies.

The Committee was organized into five task forces. The Legal Task Force was headed by L. Bates Lea, General Counsel of Standard Oil of Indiana, assisted by Stark Ritchie, API's General Counsel.

On February 25, 1976, Ritchie wrote to Frederick M. Rowe, a partner in Kirkland's Washington office, retaining the firm to

review the divestiture hearings and "prepare arguments for use in opposition to this type of legislation." On May 4, 1976, Ritchie added that the Kirkland firm's work for API "should include the preparation of possible testimony, analyzing the probable legal consequences and antitrust considerations of the proposed legislation" and "you should make an objective survey and study of the probable effects of the pending legislation, specifically including probable effects on oil companies that would have to divest assets." Ritchie noted that "[a]s a part of this study, we will arrange for interviews by your firm with a cross-section of industry personnel." The May 4 letter to Rowe concluded with:

> Your firm will, of course, act as an independent expert counsel and hold any company information learned through these interviews in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.

On May 25, 1976, Ritchie sent to 59 API member companies a survey questionnaire seeking data to be used by Kirkland in connection with its engagement by API. In the introductory memorandum to the questionnaire, Ritchie advised the 59 companies that Kirkland had "ascertained that certain types of data pertinent to the pending anti-diversification legislation are not now publicly available" and the API "would appreciate your help in providing this information to Kirkland. . . ." The memorandum included the following:

> Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, *not to be disclosed to any other company, or even to API,* except in aggregated or such other form as will preclude identifying the source company with its data.

(Emphasis in original). The data sought was to assist Kirkland "in preparing positions, arguments and testimony in opposition

to this type of legislative [divestiture]" and was not to be sent to API but rather to Kirkland.

Pursuant to the provision in Ritchie's May 4, 1976 letter to Rowe that interviews would be arranged with a cross-section of industry personnel, Nolan Clark, a Kirkland partner, interviewed representatives of eight oil companies between April 29 and June 15, 1976.

After going through several drafts, the final Kirkland report to API was released on October 15, 1976. The final report contains 230 pages of text and 82 pages of exhibits. References to uranium appear throughout the report and uranium is the primary subject of about 25 pages of text and 11 pages of exhibits. The report marshalls a large number of facts and arguments to show that oil company diversification does not threaten overall energy competition. In particular the report asserts that the relatively high concentration ratios in the uranium industry can be expected to decline, that current increases in uranium prices are a result of increasing demand, that oil company entry into uranium production has stimulated competition and diminished concentration, that oil companies have no incentive to act in concert to restrict coal or uranium production and that the historical record refutes any charge that oil companies have restricted uranium output. The report concludes that "the energy industries, both individually and collectively, are competitive today and are likely to remain so." 448 F. Supp. at 1296.

As noted at the outset of this opinion, the API report was issued on the same day as the present antitrust suit was filed against several defendants, including Gulf, Kerr-McGee and Getty.

The district court concluded that "[a] comparison of the two documents reveals a rather basic conflict in their contentions and underlying theories." 448 F. Supp. at 1295. The court also observed that "[p]erhaps in recognition of the diametrically opposing theories of the API report and the Westinghouse com-

plaint, Kirkland does not attempt to rebut the oil companies' charges that it has simultaneously taken inconsistent positions on competition in the uranium industry." 448 F. Supp. at 1296.

Gulf, Kerr-McGee and Getty are substantial dues-paying members of API. Kerr-McGee and Getty are also represented on API's board of directors.

At Ritchie's request, the cross-section interviews were mainly arranged by Gerald Thurmond, Washington Counsel of Gulf Oil Company and a member of API's Antitrust Strategy Group. On May 11, 1976, Thurmond advised Gulf officials that Nolan Clark of Kirkland planned to visit them. Attached to Thurmond's letter were the questions "which will be covered" in the meeting.[2]

2. The questions were prepared by Nolan Clark as "the kinds of questions I might want to ask":

> In which alternative energy businesses is your company engaged? How, when, and why did your company enter these businesses?
>
> What assets would your company have to divest in order to get out of alternate energy businesses?
>
> Of the affected assets, could some be divested in the form of independent operating entities? Which? Could other affected assets be sold to other presently existing entities? Which? Are you in some alternate energy businesses which could not be sold, but rather would have to be liquidated? If so, what would your estimate losses be?
>
> Would your divestiture of alternative energy businesses violate any contractual provisions of your loan or debenture agreements? Other contractual arrangements? If so, which? Would you anticipate any serious problems in renegotiating contractual provisions? If so, what kind of problems?
>
> Would you anticipate any problems of disposing of alternative energy assets? If so, what kind of problems? Are your leaseholds assignable? Would you have to sever coal & uranium mineral rights from other mineral rights? Would this cause any significant problems?
>
> Would you anticipate any problem in receiving a fair market price for assets to be divested? If so, what kind of problems and why?
>
> The statement has been made that oil and gas companies can easily divest alternate energy businesses by "spinning off" companies with those assets. Is this statement accurate?

(Footnote continued on next page.)

The meeting was held on May 28, 1976 in Denver. Nolan Clark represented Kirkland. In attendance for Gulf were six vice presidents, a comptroller and a regional attorney. Also present was a Harvard professor who "also is working with API

(Footnote continued from preceding page.)

> What specific problems do you foresee arising by the possible passage of horizontal divestiture legislation? short-term? long-term?
>
> Who if anyone would you expect to be affected adversely by horizontal divestiture? How any why?
>
> How do the problems of divestiture compare under the following scenarios: (1) the company has a given number of years to get out of alternate energy businesses subject to criminal sanctions, and (2) the company would be required to get out of alternate energy businesses in accordance with judgments entered in civil actions to be brought by Attorney General?
>
> What effect do you think passage of a horizontal divestiture bill would have on your long and short term investment plans?
>
> Do you expect that passage of horizontal divestiture legislation would affect your ability to raise capital?
>
> Are your non-oil and gas energy assets managed separately from oil and gas assets? What overlaps are there between them?
>
> Have you found that your oil and gas expertise and resources have been of any particular value as you have developed alternate energy sources? If yes, how?
>
> Do petroleum companies have specific assets that are uniquely valuable to alternative energy sources?
>
> Do you expect the same rate of return for oil drilling, coal production, uranium exploration?
>
> If an oil company owns alternative fuel possibilities, would you reasonably expect a coal division of that company to try to undersell the oil division on a BTU equivalent basis, or nuclear division to do the same thing?
>
> Do you attempt to sell oil, natural gas, coal and uranium at BTU equivalent prices? If so, why? If not, why not? Over the long run do you expect alternative energy sources to have BTU equivalent prices? Are long-run investments made, based upon this expectation?
>
> Will oil companies with substantial interests in oil production be reluctant to develop low cost alternative sources of energy, *e.g.*, oil shale?
>
> Are you presently developing coal reserves, uranium reserves? At what rate? If you do not presently plan to develop certain reserves within the near future, why not?
>
> Do you know of any oil or gas companies that have lower cost alternate sources of energy that they are not developing?

(Footnote continued on next page.)

on the same subject." The meeting lasted more than two hours followed by lunch, during which discussions continued. After the meeting and in three letters from Gulf vice president Mingee to Clark dated August 10, 11 and 13, Gulf submitted specific information sought by Clark through the questionnaire and other

(Footnote continued from preceding page.)

Under what economic conditions do you think it would make sense for an oil or gas company to acquire and not develop alternate energy sources?

With respect to coal as a synthetic fuel source, is there any fundamental economic reason why a completely new synthetic fuel industry should not develop, separate from conventional fuel industries?

When do you expect commercially feasible coal liquifaction? Coal gasification? Production of oil from oil shale? From tar sands? What magnitude of capital investments do you anticipate will be required in these various areas to reach the stage of commercial development?

Have the oil companies blocked coal liquefaction research?

If coal becomes a major sources of methane-based pipeline gas, what would be the consequences on the coal market if integrated petroleum companies are both buyers and sellers of gas and coal?

Where are the benefits from the entry of oil companies into coal?

Have oil companies increased their holdings of coal reserves faster than they have increased coal production? Are the oil companies cementing their control over future, not current, production through coal reserve ownership?

Do oil companies control the most producible and most economical coal reserves?

Is the oil industry aiding coal production?

Is entry into the coal industry difficult because of the shortage of skilled miners and skilled mine managers?

How easy or difficult is entry into the uranium mining and uranium milling businesses?

Is the uranium industry competitive? Is that industry becoming more or less competitive? What evidence could you give to support your answer?

What are the benefits from the entry of oil companies into uranium mining? Into uranium milling?

Are the oil companies aiding uranium production?

Do oil companies control the most producible and most economical uranium reserves?

Have oil companies increased their holdings of uranium reserves faster than they have increased uranium production?

written questions and in each letter Mingee stressed the confidential basis upon which the information was supplied.

Nolan Clark's interview with two Kerr-McGee vice presidents took place in Oklahoma City on June 9, 1976 and lasted about three hours. Clark was given considerable background information on Kerr-McGee's uranium industry, including mining locations, uranium conversion process, and pellet fabrication. On the subject of uranium marketing and pricing, one of the Kerr-McGee vice presidents described the escalating prices and tightening supplies in the current market, and the reasons behind the trends. Kerr-McGee sent its completed questionnaire to Clark on August 25, 1976.

Kirkland did not interview any Getty personnel. However, Getty received the confidential API questionnaire which requested it to estimate the value of its assets subject to proposed divestiture and its research and development outlays in alternative energy fields. Getty completed the questionnaire and mailed its data sheets to Nolan Clark on June 4, 1976, with the understanding that the data would be held in confidence.[3]

3. Nolan Clark had "come to the conclusion that certain information was not then available from publicly available sources" so the following questions were sent to 59 companies, including Gulf, Kerr-McGee and Getty:

I. If it became law, would S.489 apply to your company?

II. If S.489 were to become law, what would be your best good faith estimate of the $$ value of the assets that you would have to divest, in the:

(a) coal business
(b) oil shale business
(c) (1) production, mining & milling of uranium
(2) nuclear fuel cycle
(d) nuclear reactor business
(e) geothermal steam business
(f) solar energy business
(g) other

(Footnote continued on next page.)

II.

The crux of the district court's determination was based upon its view that an "attorney-client relationship is one of agency to which the general rules of agency apply" and "arises *only* when the parties have given their consent, either express or implied, to its formation." 448 F. Supp. at 1300 (emphasis supplied). Although some courts have stated that the attorney-client rela-

(Footnote continued from preceding page.)

III. Approximately how much has your company spent in the last year, the last five years, and the last ten years for research and development in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam,
(i) solar energy.

IV. What are your company's last good faith estimates of planned or projected research and development outlays for the next five years, and for the next ten years, in connection with:

(a) mining of coal
(b) gasification of coal
(c) liquefaction of coal
(d) development of oil shale
(e) development of tar sands
(f) (1) exploration, mining & milling of uranium
(2) nuclear fuel cycle
(g) nuclear reactors
(h) exploration, mining, or production of geothermal steam
(i) solar energy.

tion is one of agency and that the general rules of law applicable to agencies apply,[4] in none of those cases was an agency principle applied to assist an attorney to avoid what would otherwise be an obligation to his client.[5] Only one court seems to have added that an attorney-client relationship arises *only* when the parties have expressly or impliedly consented to its formation. *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F. 2d 169, 174 (3d Cir. 1971). In that case, the court reversed and remanded a disbarment case on the ground of lack of adequate notice of the charges and declined to pass upon the merits. 447 F. 2d at 174, n. 8.

Of course in many respects and situations an attorney acts as a simple agent for the client, but the attorney is held to obligations to the client which go far beyond those of an agent and beyond the principles of agency, just as they transcend the legal bounds of an arms-length commercial transaction. Mr. Chief Justice (then Judge) Burger said in *Udall* v. *Littell*, 366 F. 2d 668, 675, 676 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1007 (1967):

> [A]n attorney engaged in controversy with a client in relation to a contract for professional services is in some respects in a different posture from an ordinary litigant involved in an arms length commercial transaction; as an attorney he is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client.
>
> * * * * *

4. *Rothman* v. *Wilson*, 121 F. 2d 1000, 1006 (9th Cir. 1941); *Hensley* v. *United States*, 281 F. 2d 605, 607 (D. C. Cir. 1960); *Brinkley* v. *Farmers Elevator Mut. Ins. Co.*, 485 F. 2d 1283, 1286 (10th Cir. 1973).

5. In *Rothman*, the court of appeals affirmed a judgment in favor of clients against an attorney for fraud in obtaining secret profits in business transactions, in *Hensley*, the court held that an attorney can waive a jury trial on behalf of his client as a tactical decision; in *Brinkley*, the court held that a client was not liable under the doctrine of *respondeat superior* for the tortious conduct of his attorney which caused injury to a third party.

> The basic elements of the attorney-client relationship are not changed because the contract for services is expressed in a formal written contract. Indeed the very making of a formal contract and its performance impose a high duty on the attorney because he is dealing an an area in which he is expert and the client is not and as to which the client must necessarily rely on the attorney. . . . This is not to suggest that a formal contract is unimportant but rather that a formal long-term contract, superimposed on the normal attorney-client relationship, alters the relationship only by adding new dimensions of duties and obligations on the attorney.

For these reasons it is obvious why an attorney-client relationship does not arise only in the agency manner such as when the parties expressly or impliedly consent to its formation as the district court erroneously concluded.

The district court first determined that there existed no explicit or express attorney-client relationship in that no oil company representative requested Kirkland to act as its attorney orally or in writing and Kirkland did not accept such employment orally or in writing. The district court found that "Kirkland sent its legal bills to the API, and was compensated only by the API." 448 F. Supp. at 1301. A professional relationship is not dependent upon the payment of fees[6] nor, as we have noted, upon the execution of a formal contract.[7]

6. *Allman* v. *Winkelman*, 106 F. 2d 663, 665 (9th Cir. 1939), *cert. denied*, 309 U. S. 668 (1940) ("lawyer's advice to his client establishes a professional relationship though it be gratis"); *Fort Meyers Seafood Packers, Inc.* v. *Steptoe and Johnson*, 381 F. 2d 261, 262 (D. C. Cir. 1967), *cert. denied*, 390 U. S. 946 (1968) (attorney's fees paid by third party: "If appellant is not obligated to pay appellees for their services, it does not follow that there was no attorney-and-client relation"); *Dresden* v. *Willock*, 518 F. 2d 281, 286 (3d Cir. 1975) ("The fact that Dresden was to be paid by receiving stock in the enterprise did not change the nature of the [attorney-client] relationship"); *E. F. Hutton & Co.* v. *Brown*, 305 F. Supp. 371, 388 (S. D. Tex. 1969) (Relation of attorney and client "is not dependent on the payment of a fee").

7. *Udall* v. *Littell*, 366 F. 2d 668, 676 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1007 (1967); *E. F. Hutton & Co.* v. *Brown*, *supra* note 6, at 388.

The court then purported to determine whether the professional relationship "may be implied from the conduct of the parties." First, it found no "indicia" such as "the preparation of a legally-binding document like a contract or a will, or the attorney's appearance in a judicial or quasi-judicial proceeding." 448 F. Supp. at 1301. Second, the court searched for evidence of three fundamental characteristics of an agency relationship: the power to affect the legal relations of the principal and others; a fiduciary who works on behalf of his principal and primarily for his benefit; and a principal who has the right to control the conduct of the agent. 448 F. Supp. at 1301-03. Using these tests, the court concluded that "[v]iewed in its totality, we believe that the evidence shows that no attorney-client relationship has existed between Kirkland and the oil companies." As we have indicated, to apply only the agency tests is too narrow an approach for determining whether a lawyer's fiduciary obligation has arisen.

The district court also erroneously permitted itself to be influenced by the size of the law firm involved. In addition to identifying Kirkland as one of the largest law firms in Chicago with a two-city operation including 130 lawyers in the Chicago office and 40 lawyers in the Washington, D. C. office, the court observed that "[w]ith the modern-day proliferation of large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests." 488 F. Supp. at 1287-88.

Although the court recognized that "where courts have found a disclosure of client information to one member of a law firm, such knowledge has traditionally been imputed to all members of his firm," it opted in this case to reject "this rigid approach, in recognition of the changing realities of modern legal practice." 448 F. Supp. at 1304.

The district court abused its discretion in applying a narrow, formal agency approach to determining the attorney-client relation and in applying a different imputation of knowledge principle in the case of a large law firm than that "traditionally" and recently applied by this circuit to sole practitioners and smaller firms. *Schloetter* v. *Railoc of Indiana, Inc.*, 456 F. 2d 706, 710 (7th Cir. 1976).

III

The client is no longer simply the person who walks into a law office.[8] A lawyer employed by a corporation represents the entity[9] but that principle does not of itself solve the potential conflicts existing between the entity and its individual participants.[10]

Three district courts have held that each individual member of an *unincorporated* association is a client of the association's lawyer.[11] In *Halverson* v. *Convenient Food Mart, Inc.*, 458 F. 2d 927, 930 (7th Cir. 1972), we held that a lawyer who had represented an informal group of 75 franchisees "[b]ecause . . . [he] in effect had represented and benefited every franchisee, ... could reasonably believe that each one of them was his client."

Here we are faced with neither an ordinary commercial corporation nor with an informal or unincorporated association, but

8. G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978) 43; J. LIEBERMAN, CRISES AT THE BAR (1978) 189.

9. "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." ABA, Code of Professional Responsibility, EC 5-18.

10. Hazard, *supra* note 8, at 46-54; Lieberman, *supra* note 8, at 189-91. The potential for conflict also exists for the lawyer for the government. Hazard, at 54; Lieberman, at 191-92.

11. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 294 F. Supp. 1148, 1150 (E. D. Pa. 1969) (privilege case); *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 608, 614 (W. D. Pa. 1967) (privilege case); *Schwartz* v. *Broadcast Music, Inc.*, 16 F. R. D. 31 (S. D. N. Y. 1954).

instead with a nation-wide trade association with 350 corporate and 7,500 individual members (448 F. Supp. at 1290) and doing business as a non-profit corporation.

We need not make any generalized pronouncements of whether an attorney for such an organization represents every member because this case can and should be decided on a much more narrow ground.

There are several fairly common situations where, although there is no express attorney-client relationship, there exists nevertheless a fiduciary obligation or an implied professional relation:

> (1) The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.[12]
>
> (2) When information is exchanged between co-defendants and their attorneys in a criminal case, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case. *Wilson P. Abraham Const. Corp.* v. *Armco Steel Corp.*, 559 F. 2d 250 (5th Cir. 1977) (disqualification case).
>
> (3) When an insurer retains an attorney to investigate the circumstances of a claim and the insured, pursuant to a cooperation clause in the policy, cooperates with the

12. ABA Code of Professional Responsibility, EC 4-1: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the presentation by the lawyer of confidences and secrets of one who has employed or sought to employ him." *Cf.* MCCORMICK ON EVIDENCE (2d ed. 1972), § 88, p. 179: "Communications in the course of preliminary discussion with a view to employing the lawyer are privileged though the employment is in the upshot not accepted." *See also, Taylor* v. *Sheldon*, 172 Ohio St. 118, 173 N. E. 2d 892, 895 (Ohio Sup. Ct. 1961).

attorney, the attorney may not thereafter represent a third party suing the insured nor indeed continue to represent the insurer once a conflict of interest surfaces.[13]

(4) In a recent case, where an auditor's regional counsel was instrumental in hiring a second law firm to represent some plaintiffs suing the auditor and where the second firm through such relationship was in a position to receive privileged information, the second law firm, although having no direct attorney-client relationship with the auditor, was disqualified from representing the plaintiffs. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F. 2d 225 (2d Cir. 1977).

(5) In a recent case in this circuit, a law firm who represented for many years both the plaintiff in an action and also a corporation which owned 20% of the outstanding stock of the defendant corporation, was permitted to continue its representation of the plaintiff but was directed to disassociate itself from representing or advising the corporation owning 20% of defendant's stock. *Whiting Corp.* v. *White Machinery Corp.*, 567 F. 2d 713 (7th Cir. 1977).

In none of the above categories or situations did the disqualified or disadvantaged lawyer or law firm actually represent the "client" in the sense of a formal or even express attorney-client relation. In each of those categories either an implied relation was found or at least the lawyer was found to owe a fiduciary obligation to the laymen.

The professional relationship for purposes of the privilege for attorney-client communications "hinges upon the client's

13. ABA, Opinions of the Committee on Professional Ethics (1967 ed.), Formal Op. 247 (1942). *See also, State Farm Mutual Automobile Ins. Co.* v. *Walker*, 382 F. 2d 548 (7th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968). For general discussion of conflicts inherent in insurance matters, see H. DRINKER, LEGAL ETHICS (1953) 114-18; L. PATTERSON and E. CHEATHAM, THE PROFESSION OF THE LAW (1971) 237-40.

belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."[14] The affidavits before the district court established that: the Washington counsel for Gulf "was given to believe that the Kirkland firm was representing both API and Gulf;"[15] Kerr-McGee's vice president understood a Kirkland partner to explain that Kirkland was working on behalf of API and also its members such as Kerr-McGee;[16] and Getty's vice president stated that in submitting data to Kirkland he "acted upon the belief and expectation that such submission was made in order to enable [Kirkland] to render legal service to Getty in furtherance of Getty's interests."[17]

A fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged.[18] The Supreme Court approved and transmitted to Congress in 1972 the Federal Rules of Evidence,[19] which included among the lawyer-client privilege rules eventually eliminated by Congress, the following definition:[20]

> A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

14. MCCORMICK ON EVIDENCE (2d ed. 1972), § 88, p. 179. *See also,* R. WISE, LEGAL ETHICS (1970) 284: "The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought."

15. Thurmond, pars. 6-8; 448 F. Supp. at 1292.

16. Hefler, para. 12; 448 F. Supp. at 1294.

17. Copley, para. 7; 448 F. Supp. at 1294.

18. Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client.* 55 BOST. U. L. REV. 61, 66 (1975).

19. Supreme Court Order, November 20, 1972.

20. Rules of Evidence for the United States Courts and Magistrates as approved by Supreme Court (West Pub. Co. 1972), Rule 503(a)(1).

The professional relationship does not arise where one consults an attorney in a capacity other than as an attorney.[21] The district court said that the Kirkland "firm's involvement was that of an expert consultant and researcher." 448 F. Supp. at 1301. The questionnaire sent to 59 oil company members of API represented to the recipients that the Kirkland firm "is acting as an independent special counsel for API."[22] The API letter employing Kirkland expressly said that "[y]our firm will, of course, act as an independent expert counsel."[23] The lobbying-type functions undertaken by Kirkland in this case are not foreign to lawyers and in fact are a common undertaking by Washington, D.C., lawyers. In soliciting confidences from API members, Kirkland did not disavow its capacity as attorneys but came expressly represented as lawyers.

The district court concluded that "the transmission by the oil companies of confidential information on their uranium industries and assets has given rise to justifiable fears that their disclosures will return to haunt them in the present litigation" and "[t]he acquired information appears to be closely related to the subject matter of the Westinghouse complaint." 448 F. Supp. at 1304. The court did not find violations of Canons 4[24] or 5[25] because it could not find an attorney-client relationship on the basis of the narrow agency rules applied. However the court did find a Canon 9[26] violation, but did not believe that such a violation alone should result in disqualification "especially in a case of the present complexity and magnitude" involving

21. McCormick on Evidence (2d ed. 1972) § 88, pp. 179-80.

22. 448 F. Supp. at 1292-93.

23. 448 F. Supp. at 1292.

24. ABA, Code of Professional Responsibility, Canon 4: "A lawyer should preserve the confidences and secrets of a client."

25. ABA, Code of Professional Responsibility, Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."

26. ABA, Code of Professional Responsibility, Canon 9: "A lawyer should avoid even the appearance of professional impropriety."

a two-city large law firm which had attempted to segregate the substantial number of lawyers working on each matter.

The lower court perceived that "an attorney should be disqualified under Canon 9 only when 'there is a reasonable possibility of improper professional conduct' and 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.' " 448 F. Supp. at 1304.

Although Kirkland asserted, and the district court agreed, that it constructed a "Chinese wall" between the 8 to 14 Chicago-based attorneys working for Westinghouse and the 6 D.C.-based attorneys working for API, both conceded that William Jentes, one of Kirkland's lead attorneys working on the Westinghouse antitrust complaint, in August 1976 agreed with API task force head Lea, to prepare a legal memorandum analyzing arguments which had been advanced to broaden the scope of existing antitrust laws to outlaw interlocking directorates. Lea forwarded the Kirkland memorandum to the API, which mailed it to its member-company contact officers on September 23, 1976. Despite this breach of the "wall," we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm.[27] Here there exists a very reasonable possibility of improper professional conduct despite all efforts to segregate the two sizeable groups of lawyers.[28]

27. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706, 710 (7th Cir. 1976). *See also, Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 435 F. Supp. 84, 96 (S. D. N. Y.), *rev'd in part and aff'd in part*, 567 F. 2d 225, 229, n. 10 (2d Cir. 1977).

28. Judge Fairchild notes that he has a different view on this point. It is his understanding that on appeal, Kirkland does not rely on a Chinese wall theory. In his opinion, if it had been established that there was real insulation in all relevant particulars between the lawyers working in the Washington office on the API Report and those working in the Chicago office on the antitrust action, imputation of knowledge to all partners would be eliminated from consideration and a different result may have been appropriate.

Kirkland has argued that the oil companies were aware that Kirkland was representing Westinghouse while it was also representing API, inasmuch as Kirkland sought discovery from Kerr-McGee, Getty and abortively from Gulf, relating to the Richmond litigation, in the way of voluntary interviews, depositions and the production of documents. The point, however, is not that the oil companies were aware that Kirkland represented Westinghouse but whether the oil companies were aware that such representation would lead to Kirkland representing Westinghouse in a lawsuit in which the oil companies would be defendants. As the district court noted, "none of the [Kirkland] Washington attorneys working on the API divestiture assignment knew of the separate Westinghouse antitrust complaint until it was filed in court on October 15 [1976], after the stock exchanges closed on that day." 448 F. Supp. at 1296. If some of Kirkland's own partners were not aware of the Westinghouse antitrust complaint until it was filed, the oil companies can scarcely be presumed to have greater knowledge that it was impending with themselves as some of the defendants. It was Kirkland's duty to keep the oil companies advised of actual or potential conflicts of interest, not the oil companies' burden to divine those conflicts.

Gulf, Kerr-McGee and Getty each entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company. Canons 4 and 5, as well as Canon 9, apply. If Kirkland's size and multi-city status had any effect, it was in the direction of encouraging the oil companies to divulge confidential information. Whereas they might show reluctance to entrust their substantial assets and future fortunes to a sole practitioner or small law firm, Kirkland's substance and reputation would tend to comfort any apprehensions and open the lines of communication. In any event, there is no basis for creating separate disqualification

rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders.

The fact that the two contrary undertakings by Kirkland occurred contemporaneously, with each involving substantial stakes and substantially related to the other, outbalances the client's interest in continuing with its chosen attorney. However, we believe that Westinghouse should have the option and choice of dismissing Gulf, Kerr-McGee and Getty from the antitrust case or discharging Kirkland as its attorney in the case. Substitute counsel has represented Westinghouse in the case since February 17, 1978, so that the impact of any change-over has been somewhat eased.

IV

The Noranda motion to disqualify Kirkland was based on an entirely different set of circumstances.

Noranda is a Canadian corporation organized under the laws of the Province of Ontario, having its principal place of business in Toronto. In 1965, Kirkland represented Noranda in the formation of a joint venture with Central Farmers Fertilizer Company, a domestic corporation centered in Chicago, Illinois. By that agreement, Noranda and Central formed a Canadian corporation to mine potash in Canada. The only possible nexus between the Central transaction and the present litigation is Noranda's belief that Kirkland may have learned the name of one of its executives, D. E. G. Schmitt, whose deposition was scheduled. The district court, finding that "[e]ven Noranda admits that Kirkland has alternate public sources of information for Schmitt's identity," found no substantial relationship between the character of a potash joint venture and a uranium price-fixing conspiracy, 448 F. Supp. at 1308.

In 1967, Kirkland, working in conjunction with Noranda's general counsel in Toronto, advised Noranda on the impact of United States' antitrust, corporation, securities and tax laws on a

proposed exchange offer involved in Noranda's abortive effort to acquire control of Essex Wire Corporation. The mechanics of the exchange required the formation of a Delaware subsidiary of the Canadian parent corporation. Kirkland organized the American subsidiary, which included the naming of three Kirkland attorneys as incorporators, the holding of the first meeting, and the election of directors. Three Kirkland attorneys studied the antitrust issues which culminated in the preparation of a "Fact Book," which analyzed the competitive impact of the prospective acquisition. Both Noranda and Essex sold copper cable and wire in the United States and Noranda was to become the supplier of Essex's considerable copper requirements.

The tender offer was aborted and on August 1, 1967, Kirkland returned to Noranda all of its personal material. Kirkland simultaneously destroyed the longhand notes of its attorneys who viewed corporate data. Kirkland has not represented Noranda on any matter since 1967.

Noranda contended that Kirkland gained access in 1965-1967 to its relationship to Noranda Sales Corporation, Ltd. and Kerr-Addison Mines Limited, the first of which tied Noranda into doing business in Illinois and the second of which is involved in the uranium industry. After an exhaustive study of the affidavits and material submitted, 448 F. Supp. at 1306-10, the district court found no substantial relationship between Kirkland's earlier representation relating to the copper industry and the presently-alleged uranium price-fixing conspiracy which did not begin until 1972. The court concluded that "the Westinghouse complaint concerns a completely different industry and a completely different time." Noranda's relation to Noranda Sales and Kerr-Addison appears in publicly-available documents, such as Noranda's annual reports and Dun and Bradstreet reports.

We do not believe that the district court abused its discretion in concluding that the more than 10-year past representations for two specific matters unrelated to the present case did not

warrant disqualification of Kirkland. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F. 2d 706 (7th Cir. 1976).

Judgment in Appeal No. 78-1545 is affirmed; judgments in Nos. 78-1544, 78-1546 and 78-1547 are reversed and remanded.[29]

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

29. The motions to strike appellee's brief and appendix are denied.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WESTINGHOUSE ELECTRIC CORPORATION, *Plaintiff,* *vs.* RIO ALGOM LIMITED, etc., et al., *Defendants.*	No. 76 C 3830

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Prentice H. Marshall, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Wednesday, April 19, 1978, at 2:00 o'clock p.m.

* * * * *

Mr. McGee: I received my copy of the opinion, about 9:00 o'clock last evening, and have been able to read it over several times since then.

I think it's certainly very thorough, a very careful memorandum.

I only find one major problem with it and that is that it reached the wrong conclusion.

But apart from that I have not had the opportunity of discussing it with my client at length.

I would like to request the Court for a few days continuing of the interim order regarding discovery and Kirkland's part in it to permit us to at least decide whether or not we wish to

appeal the order, and we will promptly notify Kirkland and your Honor when we have reached a decision.

The Court: Let me ask you this: I know that orders disqualifying counsel are appealable, at least in this Circuit they are.

Are orders which refuse to disqualify counsel appealable in this Circuit?

Mr. Bartlit: They are, your Honor.

The Court: Are they?

Mr. Bartlit: Yes, sir.

The Court: Okay. Without a certification or any such step on my part?

Mr. Bartlit: Yes, sir, 546 F 2d, 706 seems to take that position.

The Court: Okay. Well, I realize—the opinion took us longer than it would, and I had originally—well, the last date that I gave you was one in March, and I was really resolved to get it to you prior to today, and I thought that it would get there a few days earlier than it did.

Certainly you should have the opportunity, Mr. McGee, and all of your colleagues who were involved in the motion to discuss it with your clients.

And I am willing for a brief period of time to continue the discovery stay.

However, I do want you to know that any further stay of discovery will be granted by the Court of Appeals.

I will give you a week to decide if you think that's enough time to decide whether you are going to appeal, so that you don't — you are not caught in a total pressure situation.

* * * * *

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

WESTINGHOUSE ELECTRIC CORPORATION, *Plaintiff,*
vs.
RIO ALGOM LIMITED, etc., et al., *Defendants.*
No. 76 C 3830

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Prentice H. Marshall, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday, April 24, 1978, at 9:30 o'clock a.m.

* * * * *

Mr. McGee: We did not have an opportunity, Judge, to respond to the Kirkland papers, since we received them about 9:25 yesterday morning.

I am sure that your Honor recognizes that we strenuously object to the characterizations which are set forth in those findings and conclusions.

We don't agree in any way that there is any irreparable harm and injury to Kirkland or Westinghouse here.

Discovery is proceeding in accordance with your Honor's interim orders.

The fact that these orders concerning disqualification are appealable in themselves, I believe supplies all the legal reason-

ing necessary to point out where the irreparable harm and injury lies to the person who is the losing end of the motion below, which is the reason they are appealed, and we think that their characterizations are completely inaccurate.

I am not asking for time to answer their findings of fact.

I do want to state to your Honor and to Mr. Bartlit that we will cooperate in every way possible to expedite this thing in the Court of Appeals. This is not interposed for delay. This is interposed because we think your Honor's opinion raises some very grave questions concerning the propriety of counsel's conduct which should be decided by the Appellate Court.

And it's for that reason alone that we are seeking the stay here and will seek a stay from the Court of Appeals as soon as the record is complete.

The Court: Well, I do not think for a moment, Mr. McGee, that you and your colleagues for the defense are seeking to delay the trial or other disposition of this case.

I think the questions that were presented by the motions for disqualification were important questions.

That's one of the reasons it took us as long as it did to get the job done.

* * * * *